No. 4518

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine No. 34,822, its tools and appurtenances, WHITE COMPANY, claimant,
Appellee.

BRIEF FOR APPELLEE.

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OPENING STATEMENT.

Appellant's statement of facts of this case is, we believe, correct. It is desired, however, to add and to emphasize the fact, which is disclosed by the record, that White Company, a corporation, claimant and appellee herein, was innocent of any complicity in the offense charged in the libel on file and was entirely ignorant that the Fageol truck, its property by virtue of a conditional sales contract under which it was the vendor, was intended to be used or was used in the commission of the offense charged. This fact, we believe, should at all times be kept in mind in determining the rights involved in this appeal.

ARGUMENT.

The District Court sustained the exceptions of appellee without leave to amend and directed that the libel be dismissed and the truck released to the claimant. The Court based its decision partially at least upon the ground that Section 3450 of the Revised Statutes had been repealed impliedly by the National Prohibition Act in so far as intoxicating liquors are concerned and might well have based its ruling upon other grounds as will hereinafter be shown. The question chiefly considered by appellant is whether or not Section 3450 of the Revised Statutes has been repealed by the National Prohibition Act. We believe, however, that the issue as to Section 3450 is rather whether or not the said Section 3450 may be made use of by the Government under the circumstances of this case, to deprive an owner of his automobile where such owner is entirely innocent and has at all times acted in good faith.

I.

SECTION 3450 OF THE REVISED STATUTES HAS FOR THE PURPOSE OF THIS CASE BEEN REPEALED BY THE ENACTMENT OF THE NATIONAL PROHIBITION ACT.

We agree with appellant that the chief difference for the purpose of this case between Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Act is that while the rights of innocent owners and lien holders were subject to forfeiture under Section 3450,

under Section 26 of the National Prohibition Act, means are afforded to protect such innocent persons who have acted in good faith. It is the contention of appellee that the said Section 3450 has been repealed by implication. The point has, in fact, been passed upon by this Honorable Court in the case of

McDowell v. U. S., 286 Fed. 521,

and also in a later case,

One Big Six Studebaker, etc., v. U. S., 289 Fed. 256,

in both of which cases Section 3450 was expressly held to have been repealed by the enactment of Section 26 of the National Prohibition Act. Appellant urges that the *McDowell* case has been rendered useless as a precedent by the case of

U. S. v. Stafoff, 260 U. S. 477, 67 L. Ed. 358,

and the enactment of the Willis-Campbell Act, particularly Section 5 thereof. We submit on the contrary that in a case where an innocent party appears as owner and claimant and makes a showing of good faith, as to him at least the provisions of Section 3450 are repealed and inapplicable. Our contention in this regard is based upon the very wording of the said Section 5, of the Willis-Campbell Act, which reads as follows:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquors and all penalties for violation of such laws as were in force when the National Prohibition Act was enacted shall continue and be in force

> as to both beverage and non-beverage liquors, except such provisions of such laws as are directly in conflict with any provisions of the National Prohibition Act or of this Act."

We contend with respect to the rights of innocent owners that Section 3450 of the Revised Statutes is "directly in conflict" (to use the exact words of Section 5) with Section 26 of the National Prohibition Act and that therefore the said Section 3450 is repealed by the very wording of the said Section 5 of the Willis-Campbell Act. Whatever may be said for the Stafoff case cited by counsel as a general declaration of the effect of the enactment of the Willis-Campbell Act upon former cases, it did not pass directly and specifically upon such a set of facts as are involved in this case, nor did it pass directly and specifically upon the effect of the said act upon Section 3450 of the Revised Statutes. It did pass upon Sections 3242, 3258, 3281 and 3282, which forbade carrying on a distilling or rectifying business, except upon certain conditions. These sections therefore forbid things which the Prohibition Law also forbids, the only difference being that the fulfilling of certain conditions in the case of the Revenue Laws made the doing of these things lawful. They are in accord with the Prohibition Act rather than in conflict with it. But an entirely different situation is apparent where the right of an innocent owner is sought to be forfeited under Section 3450 of the Revised Statutes and therefore the Stafoff case is without applica-

tion in this appeal. Surely nothing could be more contrary in result than Sections 3450 and Section 26 of the National Prohibition Act with respect to the rights of persons situated as is claimant and appellee herein. One, Section 3450, utterly deprives of property in spite of the showing of good faith and the other, Section 26 of the National Prohibition Act permits the retention or recovery of property upon a showing of innocence. Certainly it is true that Congress by the enactment of Section 26 expressed the intention of preserving and protecting the rights of innocent owners and lien holders in cases where vehicles are seized for carrying illicit liquor, and it is equally clear that Section 3450 as it is enforced results in neither preserving nor protecting the rights of innocent owners and lien holders, and is therefore utterly inconsistent with the provisions of Section 26 of the National Prohibition Act and in direct conflict therewith. This question has been very recently considered in

Commercial Credit Company v. U. S., C. C. A. Sixth Circuit, decided April 6, 1925, and not yet reported (see appendix).

In this case the Court said:

> "Another consideration tends to the same result. We pointed out in the Lewis case such a measure of inconsistency in the two statutes in their relative effect on the same act (though not direct conflict) as supported the inference of implied repeal of the third class. The 're-enactment' made by the Willis-Campbell Act, is not of all laws that may have been impliedly

repealed by the National Prohibition Act, but only of 'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors' and 'penalties for violation of such laws.' Only by the broadest construction can Sec. 3450 be brought within this classification. It provides a penalty which within its total scope may have incidental effect upon liquor taxation; but Sec. 3450 does not directly mention liquor taxation, and only with difficulty can it be said to be 'a law in regard to' that subject.

May our conclusion that there is 'direct conflict' between the old revenue per-gallon system of taxation and the National Prohibition Act forbidding any advance tax stamps or receipts be said to be itself inconsistent with the Stafoff case? We think not. That case did not involve any per-gallon system of taxation and tax payment, even by distillers. It considered only R. S. Secs. 3242, 3258, 3281 and 3282. These sections forbade carrying on a distilling or rectifying business, except upon certain conditions precedent, paying special tax, giving bond and registering. The Court found no 'direct conflict' between these sections and the National Prohibition Act. Obviously not. There is no 'direct conflict' between a provision prohibiting an act unless after condition performed and a provision prohibiting it entirely. There is substantial accord. There is only that inconsistency coming from the implied permission for one to do the act if willing to perform the condition. There is in the comparison of these sections a good illustration of that mere inconsistency which was enough to work repeal under Sec. 35, but not enough to be the 'direct conflict' of the Willis-Campbell Act.

Our conclusion is confirmed—indeed sufficiently supported by—a comparison of the

rights of the parties under Sec. 26 and under Sec. 3450, as the latter is construed by the Government to reach mere transportation and as it has been interpreted in the Goldsmith-Grant case. With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections; under either he loses every right he has in the vehicle. *It is otherwise with reference to the good faith mortgage, or title holder. Sec. 3450 says his rights shall be forfeited; Sec. 26 says they shall not. Could inconsistency be more clearly 'conflict', or 'conflict' more surely direct?'* " (Italics ours.)

U. S. v. One Ford Coupe, Decided Feb. 27, 1925, in C. C. A. Fifth Circuit, and not yet reported (see Appendix).

II.

IT IS FUNDAMENTAL THAT PERSONS MAY NOT BE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

An apparent exception to this general rule is evident where an innocent person is deprived of his property through the use by the Government of Section 3450 to bring about the forfeiture of such property where it has been used by a person other than the owner to defraud the Government of taxes. This is accomplished by means of an action in rem directed against the property itself and is a proceeding which involves the use of a very palpable fiction and does, in fact, result in innocent persons being deprived of their property. This exception

to the general rule is justified by public policy and necessity of the Government to protect its revenue. In the case

Goldsmith-Grant Company v. U. S., 254 U. S. 505,

the Court justified the use of this fiction by the following language:

> "If the case were the first of its kind it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words, taken literally, forfeit property illicitly used, though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence, plausibly urged that such could not have been the intention of Congress; that Congress necessarily had in mind the facts and practices of the world, and that, in the conveniences of business and of life, property is often and sometimes necessarily put into the possession of another than its owner. And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner, who was without guilt.
>
> Regarded in this abstraction the argument is formidable; but there are other and militating considerations. Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provisions against their violation or evasion, and the ways and means of violation or evasion."

It is evident therefore that only the necessity of the Government to protect its revenue justifies the rule annunciated by the above quoted case, and it may with equal logic be deduced from the said case that where no such necessity appears, the application of the harsh rules of forfeiture therein set forth becomes unjustifiable and results in fact in the deprivation of the property without due process of law.

III.

THE ACTUAL REASON FOR THE SEIZING AND ATTEMPT AT FORFEITURE OF THE TRUCK INVOLVED IN THIS APPEAL WAS NOT TO PROTECT REVENUE FOR THE GOVERNMENT, BUT WAS DESIGNED TO PUNISH FOR A VIOLATION OF THE PROHIBITION ACT.

This being the fact, it follows that the harsh rule of the *Goldsmith-Grant* case cannot with any justice be applied to the instant situation. It is a matter of record (see record in *U. S. v. Leonard Brooks,* Criminal No. 15108, U. S. District Court, Southern Division, Northern District of California, Division One) that the Fageol truck here involved was seized and the driver charged with the violation of the National Prohibition Act. Thereafter the libel herein was filed while the truck was still in the hands of the Government. It is the contention of appellee that such seizure and the filing of the said libel was in fact a part and parcel, any designation to the contrary notwithstanding, of the procedure brought under the National Prohibition

Act. In other words that the offense was regarded by the Government as a violation of the Prohibition Act and that the procedure to forfeit the truck was in fact designed and intended by the Government as a punishment not for violation of the Revenue Laws, but for a violation of the National Prohibition Act. The case is typical of many others and it is respectfully urged that this Honorable Court establish a precedent whereby the matter in the future may be regarded in its true light, namely, as a situation where the harsh rule justifiable only in cases where the revenue is really in need of protection is unjustifiably employed to punish for a violation of the National Prohibition Act and to deprive innocent persons of their property without due process of law. Clearly a proceeding in which innocence is no defense is not due process.

We submit that the claimant and appellee herein should be protected against this unfair procedure by the Government and that the Government should be obliged in cases where an innocent claimant appears and shows his good faith to proceed under Section 26 of the National Prohibition Act so that he may protect himself and upon showing of good faith recover his property. We submit that to subject the claimant and appellee here to a trial where innocence is no protection is fundamentally contrary to the principle which protects persons from deprivation of property without due process of law, and that in view of the fact that the proceeding in the District Court was really em-

ployed to punish for a violation of the National Prohibition Act that claimant herein should be found to be entitled to the protection of Section 26, and that as to him, Section 3450 is impliedly repealed and ineffective.

IV.

THE TAXES PROVIDED BY SECTION 600 OF THE REVENUE ACT OF 1918 ARE PENAL IN CHARACTER AND ARE NOT DUE UNTIL AFTER A HEARING AND THE LIBEL HEREIN WAS THEREFORE PREMATURELY FILED.

The mere designation by Congress as "a tax" of money due the Government under the said Section 600 and similar enactments does not of itself make such money a tax where its purpose is penal, and where a so-called tax is penal in its nature it may not be levied and is not due until the person against whom the collection is attempted has an opportunity for a fair hearing.

These principles are annunciated in the case of *Lipke v. Lederer,* 259 U. S. 557, wherein Section 35 of the National Prohibition Act was contrued. This section reads in part:

> "No liquor revenue stamps or tax receipts for any illegal manufacture or sale, shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against and collected from the person responsible for such illegal manufacture or sale in double the amount now provided by law with an additional penalty on retail dealers

> and $1000.00 on manufacturers. Payment of such tax shall give no right to engage in the manufacture or sale of such liquor or relieve anyone from criminal liability nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

The Court held that the so-called tax therein provided for was in fact a penalty and could not be levied without a hearing.

A part of Section 5 of the Willis-Campbell Act provides as follows:

> "All taxes and tax penalties provided for in Section 35 of Title 2 of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture or traffic in liquor."

This provision of the Willis-Campbell Act it was held in

> *Dukich v. Blair,* 3 Fed. (2d) 302, Decided Jan. 19, 1925,

did not nullify the effect of the *Lederer* case, but was, in fact, unconstitutional in that it attempted to empower the collection and assessment of taxes, which were in fact penalties, without due process of law.

In

> *Regal Drug Co. v. Wardel,* 260 U. S. 386,

the Supreme Court concluded that certain taxes, including a so-called tax of $6.40 per gallon upon

distilled liquor (apparently the tax here involved levied by Section 600 of the Revenue Act of 1918), were in fact penalties and could not be levied without a hearing. The said Regal Drug Company case is followed in

> *U. S. v. American Brewing Co.,* 296 Fed. 772, a Pennsylvania case Decided in February, 1924,

which case also relied upon *Lipke v. Lederer* and holds that the tax on fermented liquor containing one-half of one per cent or more of alcohol which is imposed by the Revenue Act of 1919, paragraph 606 (Comp. St. Ann. Sup. 1919) and continued in force by the Revenue Act of 1921, is since the enactment of the National Prohibition Act a penalty and not a tax. This so-called tax is in no way distinguishable from the tax provided by Section 600 involved in the instant case, except that it applied to fermented rather than distilled liquor and the case is authority for our contention that the tax herein involved is not in fact a tax but is a penalty. The Court said in the said case of

> *U. S. v. American Brewing Co.,*
>
> "The authorization of warrants for search and seizure under the Internal Revenue Laws and Sections 3340 and 3450 of the Revenue Statutes dealing with the forfeiture of property are solely in aid of the collection of taxes, but the so-called tax imposed by Section 608 of the Act of February 24, 1919 re-enacted in 1921 is clearly a penalty and not a tax. The

> decisions of the Supreme Court are conclusive as to this * * * ."

Identically the same holding appears in the case of

U. S. v. 2615 Barrels more or less of Beer, 1 Fed. 2nd 500,

wherein the above language is quoted and approved. It is also annunciated in the above cited cases that even though money due the government is in fact a tax, if it is imposed as a penalty it is not due and collectible until after a proper hearing.

See also

Sullivan v. Felix, 233 U. S. 318-324;

Fontenot v. Accerdo, 278 Fed. 871;

U. S. v. One Haynes Automobile, C. C. A. 5th Circuit, 274 Fed. 926;

Commercial Credit Company v. U. S., C. C. A. 6th Circuit not yet reported (see appendix).

It follows inevitably therefore that the libel in this case, even if we grant for the purpose of argument that it was designed to impose a penalty for failure to pay taxes rather than to impose a penalty for the violation of the National Prohibition Act, was prematurely brought for the reason that no such taxes were yet due, and it further follows therefore that the exceptions to the said libel were properly sustained without leave to amend and the libel dismissed.

We submit to this Honorable Court upon the authority of the above cited cases that the tax speci-

fied in the libel on file herein, to-wit, Section 600 of the Revenue Act of 1918 as amended by the Revenue Act of 1921 is in fact a penalty or penal in its intent and purpose and therefore could not be due until after a proper hearing.

In conclusion we respectfully urge that the ruling of the District Court should be affirmed for the following reasons:

1. For the reason that Section 3450 of the Revised Statutes has been repealed by implication so as to make it inapplicable in this case as against an innocent owner, the appellee herein.

2. For the reason that the use of Section 3450 to bring about a forfeiture in this case was designed to punish for a violation of the Prohibition Act and not as a penalty for non-payment of taxes, and that thereby the Government is diverting the remedy of Section 3450 as against an innocent owner beyond the authority of the *Goldsmith-Grant* case and in such a way as to deprive him of his property without due process of law, and is further depriving such innocent owner of the right and remedy expressly provided him under the circumstances of the case at bar by Section 26 of the National Prohibition Act.

3. For the reason that the so-called tax upon which the libel is founded is in fact a penalty and not due the Government from any person until a

proper hearing and that not being properly found due the libel herein was prematurely brought.

Dated, San Francisco,
June 3, 1925.

Respectfully submitted,
MELVIN, DINGLEY & STEVICK,
Attorneys for Appellee.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

DECISIONS NOT YET REPORTED.

April 6, 1925.

In the United States Circuit Court of Appeal Sixth Circuit.

THE COMMERCIAL CREDIT COMPANY, Plaintiff in Error, vs. UNITED STATES, Defendant in Error.

Before Denison, Donahue and Morgan, Circuit Judges.

Denison, Circuit Judge:

While an automobile was being used for the transportation of illicit whisky, the car and contents were seized by federal prohibition agents, acting under Sec. 26 of the National Prohibition Act. Those in charge of the car were prosecuted and convicted under that act, but not otherwise. Thereupon the United States brought a libel against the automobile, alleging the foregoing facts, and further that the whisky being transported was subject to a tax of $4.20 per gallon by the Revenue Act of 1918, and was being removed by means of the automobile with intent to defraud the United States of such tax, and praying that the automobile be condemned and confiscated, pursuant to Sec. 26 of the National Prohibition Act, and pursuant to R. S. Sec. 3450 (U. S. C. S., Sec. 6352). Thereupon there issued to the marshal a warrant of seizure and a monition. In response thereto the Commercial Credit Company, as intervening claimant, an-

swered, showing that it was the good-faith owner of a duly recorded purchase-money chattel mortgage upon the automobile, and that neither it nor its assignor, the original vendor, had any knowledge or any reason to suspect that the automobile would be used, or was being used, for any unlawful purpose. Thereupon it prayed recognition of its lien for the unpaid balance. Upon the hearing, the facts alleged in the intervening petition were admitted, but the court held that Sec. 3450 was applicable, and entered the judgment of condemnation, review of which is here sought.

The case presents three substantial questions, measurably but not wholly distinct. The first is whether such transportation as here occurred, if it had been before the passage of the National Prohibition Act, would have been that "removal" which Sec. 3450 denounces. The second is on the assumption that the first is answered in the affirmative, and is as to the status in which such transportation has now been put by the passage of the National Prohibition Act and the Willis-Campbell Act. The third assumes that the right of condemnation under Sec. 3450 would otherwise exist, and is as to the effect of the Government's action in seizing under Sec. 26 and prosecuting and convicting under that section the persons transporting. These questions have given rise to a great variety of opinion. These decisions, so far as we observe them, are cited and collected in the margin. [1] Before discussing these questions we may well notice

that the Government's theory will carry condemnation very far. If the theory is correct, every automobile in which any quantity of non-tax paid liquor has been carried is absolutely forfeit, regardless of the participation, guilty knowledge or even negligence of the title or lien holder. All title and liens upon this kind of property become unstable and unsafe. As to the first and second questions our initial attention will be challenged by testing the affirmative theory on an extreme case, but one short of which it seemingly cannot stop. If the automobile driver is carrying in his pocket for the purpose of sale one unstamped half-ounce package of morphine, on which the unpaid stamp tax is one cent, is the automobile to be totally condemned?

Coming to the first: It is to be noted that while Sec. 3450 says "removed, deposited or concealed," the libel in this case charges only "removal" and does not charge "deposit or concealment." Hence we are not directly called upon to consider this phrase "deposit or concealment." (a) The claimant's contention is that at the time Sec. 3450 was enacted, as well as when it was re-enacted in the Revised Statutes, the Internal Revenue system contemplated a place of manufacture or of storage, and a tax which was payable as a condition of storage at or of removal from that place, and hence that a proper construction of the act reaches only a removal from that place, leaving the tax unpaid. It is then said that by such removal (or deposit or concealment) by the person charged with the

duty of paying the tax, the offense is completed, and it does not again arise upon a subsequent transportation by someone else in the way naturally incident to the sale of any commodity. The article here transported is said to have been moonshine whisky, but there is nothing to indicate that the transporters were distillers, or acting for the distillers. The natural inference, the one which we accept for the purposes of the case, is that they had bought this whisky, mediately or immediately, from the distillers and were transporting it in connection with a resale. It must also be inferred that they knew or had reason to know that no tax had been paid.

The duty of the distillers (before 1920) was to deposit this liquor in their bonded warehouse (after temporary storage in the receiving cistern, R. S. 3267) and to pay the tax before removal therefrom. (Sundry Stats., e. g., U.S.C.S. Secs. 5986 and 6029c.) If in violation of law they took it elsewhere from the still, the per-gallon tax was to be assessed by the Commissioner upon the distillers (R. S. Sec. 3253), who were made personally liable. Those who merely transport, after one removal, are seemingly under no duty to pay the tax. We find no statute imposing that duty. It does not seem to be a strong or violent inference, properly supporting a presumption of law, that one who is not in collusion with or aiding the defaulting taxpayer and who merely transports for his own purposes the non-tax paid article, is thereby guilty of intent to de-

fraud the Government out of the tax. If there were continuing liens upon the liquor itself for the tax, the inference might be stronger, but we find no statute creating such a lien. The lien is given against the distillery. True, the tax "attaches" to the liquor when made, but this, without more, indicates rather a perfected, though unmatured, duty by the distiller to pay, rather than an enforceable lien.

(b) Further, "removed" and "transport" are not necessarily synonymous. The first more distinctly implies a taking away from an existing position and hence is particularly applicable to those cases where the paying of the tax is a condition of the right to change the article from a fixed to a transitory status.

We do not feel at liberty to follow out this first question to an independent conclusion. In the Goldsmith-Grant case (254 U. S. 505), the transporting in an automobile of non-tax paid liquor was under consideration. So far as the opinion shows the record did not indicate, any more than the present one does, that the persons transporting were distillers or in collusion with them. It is true that the argument, that mere transportation by a later owner is not the removal of Sec. 3450, was not considered in the opinion, if indeed it was presented; and it is true that for this reason the Supreme Court might well regard the question as not concluded by that opinion; but we think we must interpret it as obligatory upon us to its full, ap-

parent extent, and as requiring us to answer in the affirmative the above stated first question.

Coming to the second question: Assuming that the transportation here existing was "removal," within the original meaning of Sec. 3450, is the pertinent clause of that section now in force to the extent necessary to reach this particular transaction? It is obvious that the old revenue laws were repealed by the National Prohibition Act as to two classes of their provisions: First, those where there was repeal in terms; and second, those where the new provisions were so directly in conflict with the old that both could not stand together; and, although the second kind of repeal is called one by implication, it might well be called express. The term "implied repeal," covers also a third class, being those further cases where, although there is no direct conflict, the intent of the legislature, determined according to settled canons of construction, is inferred to the effect that the new provision was intended to supersede the old. In the Yuginovitch case (256 U. S. 450),—interpreting the decision in the aspect here important,—it was held that where the same act was an offense, both under the old law and the new, and where the new law provided therefor another and a lesser punishment or penalty, there was an implied repeal (of the above stated third class). Applying this decision we held in the Lewis case (280 Fed. 5), that in so far as Sec. 3450 might apply to the same transportation which was the subject of Sec. 26 of

the National Prohibition Act, Sec. 3450 was no longer in force. We pointed out other considerations that led us to suggest a "direct conflict" between the pertinent aspect of Sec. 3450 and the National Prohibition Act, but we did not reach any conclusion thereon.

Then came the Willis-Campbell Act of November 23, 1921. As interpreted in Stafoff case (260 U. S. 477), this act recognized all repeals by implication (of the third class) then existing by the effect of the National Prohibition Act and the Yuginovitch case, and as to these old provisions, thus impliedly repealed, re-enacted them, making express, though seemingly unnecessary, declaration that existing repeals which were the result of "direct conflict" should remain indisturbed. Thus the Lewis case ceases to be continuing authority, but the question whether there is direct conflict between the National Prohibition Act and this part of Sec. 3450, or any other provision of the old law on which forfeiture by Sec. 3450 depends, remains open.

The question of "intent to defraud" as bearing on the meaning of "removal,"—that is, whose intent and when formed,—has been considered. We now observe that the intent must be to defraud the United States "of such tax," and this takes us to the opening clause referring to "goods or commodities for or in respect whereof any tax is imposed." Within the fair meaning of this clause, and as affected by the "direct conflict" aspect of the National Prohibition Act, was there, in 1924

any "tax imposed" upon the liquor being transported, so that the carriers could be guilty of the punishable intent? The power of Congress to impose a tax upon that which it prohibits, is not to be questioned. The inquiry is, has Congress done so, by laws in force after November, 1921?

When we inquire about a tax the first thought is —"What tax?" In some of the cases it has been said that the tax authorized by Sec. 35 of the National Prohibition Act, answered this question; but, passing the difficulty of finding an intent to defraud the Government of a tax which does not exist, and the doubt whether this section has any reference to a per-gallon tax, it has been authoritatively held (Lipke v. Lederer, 259 U. S. 557, 561), that the assessment which may be made under this section is not of a tax, but of a penalty for law violation. So it must be quite clear that the requirement of Sec. 3450 that there shall be an intent to defraud "of a tax" cannot be satisfied by finding no tax only a penalty. R. S. Sec. 3296 is in the same situation. It does not provide a precedent tax out of which one may intend to defraud the Government; it provides a penalty to be assessed as punishment for wrongdoing.

Apparently, previous statutes, like R. S. Sec. 3251, were superseded by Sec. 48 of the Act of August 27, 1894 (whether the lien and personal liability clauses of 3251 would survive is here immaterial). The Act of 1894 adopts and makes ap-

plicable the existing provisions of law for the payment of taxes by the use of stamps. This act levied a tax of $1.10 on each proof gallon; we do not find that it contemplated or permitted any means of collection, or payment, save through the system of selling of tax-paid stamps by the collector. It provided for payment by the distillee before removal. This statute in turn was partially superseded by Sec. 600 (a) of the Revenue Act of 1918 (40 Stats., 1105). This provides that in lieu of all other Internal Revenue Taxes:

"There shall be levied and collected on all distilled spirit * * * that may be hereafter produced in * * * the United States * * * a tax of $2.20 (or, if withdrawn, for beverage purposes or for use in manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of the existing law."

When this act was passed the manufacture of whisky for beverage purposes or its withdrawal from bond for such purposes was lawful, except as temporarily suspended by the War Prohibition Act. The evident theory was that at the time the distilled spirits were withdrawn from the distillery or bonded warehouse, they should be classified as for beverage, or for industrial, medicinal, etc., purposes, and the tax paid accordingly. It was at least difficult to apply this statute intelligently to

"moonshine" whisky, which never reached the contemplated point of withdrawal or classification; but then we come to Sec. 600 of the Revenue Act of 1921 (40 Stats., 285). This amended the last quoted statute by adding thereto: "Provided, that on all distilled spirits on which a tax is paid at the non-beverage rate of $2.20 per proof gallon and which are averted to beverage purposes or for use in manufacture or production of any article, used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, * * * to be paid by the person responsible for such diversion."

Since the National Prohibition Act then forbade any diversion to beverage purposes or for use in an article intended for a beverage, here we have perhaps for the first time, the clear imposition by Congress of a per-gallon tax on the liquor involved in any forbidden transaction; but here, again, it seems most difficult to make application of the provision to moonshine liquor. Indeed the amendment of 1921 cannot refer to such liquor, since its effect is confined to spirits on which the non-beverage tax has been paid, [2] and its apparent scope was limited to spirits which had been withdrawn for industrial or other lawful purposes and then were diverted; but even if it were otherwise applicable, we do not find in this record any charge that the persons who transported were the "persons responsible" for the diversion. In any effort to invoke this amendment of 1921, we must observe that this illicit liquor is

diverted to beverage purposes the moment it is made as much at it ever is until its use as a beverage is finally accomplished; and it would hardly be thought that the ultimate consumer is the person intended to be taxed by the amendment of 1921, or that his act is "deposit or concealment" under R. S. Sec. 3450.

Were it assumed that the distiller of moonshine wished to pay the per-gallon tax thereon,—whatever the amount might be, $2.20 or $6.40,—he would have difficulty enough in doing so, though possibly the implication of R. S. Sec. 3253 would point the way; but if the later purchaser of the same liquor wished to make this payment, would he be able to discover any way in which it could be done? If he could have done it under the old revenue laws, it would have been by the purchase of stamps and affixing them to the package—though he was not entitled to buy stamps and practically he could not have done this; but the National Prohibition Act, Sec. 35, after providing that the Act shall not relieve any one from paying any taxes imposed upon the manufacture of such liquor or the traffic in it —a provision obviously intended to retain some liability on the part of the manufacturer and trafficker but reaching no one else—proceeds, "no liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance. * * *." So far as we find there was in the old revenue laws no way of paying any per-gallon tax except to pay it by revenue stamps "in ad-

vance" of the act which would make the liquor available for use; but now comes Sec. 35 and prohibits the issue of any revenue stamps or tax receipts in advance.

Unless we have in some respect misapprehended the system, we cannot find that the mere transporter of moonshine is under duty to pay a per-gallon tax, which duty would make it the necessary basis for his intent to defraud; and we must regard the provision of Sec. 35, abolishing and forbidding all advance payments through stamps and receipts, to be in "direct conflict" with the old system of per-gallon taxation, and hence to repeal it pro tanto.[3]

We do not see that this liquor can be thought of as possibly produced for non-beverage purposes, and hence still subject to taxation on that theory. The system of producing non-beverage spirits is surrounded by careful safeguards; the law in that respect is to be enforced by the specified punishment for disregarding these safeguards, not by reference drawn from any fiction that illicit liquor is to be considered, for convenient purposes, as if lawful.

Another consideration tends to the same result. We pointed out in the Lewis case such a measure of inconsistency in the two statutes in their relative effect on the same act (though not direct conflict) as supported the inference of implied repeal of the third class. The "re-enactment" made by

the Willis-Campbell Act, is not of all laws that may have been impliedly repealed by the National Prohibition Act, but only of "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors" and "penalties for violation of such laws." Only by the broadest construction can Sec. 3450 be brought within this classification. It provides a penalty which within its total scope may have incidental effect upon liquor taxation; but Sec. 3450 does not directly mention liquor taxation, and only with difficulty can it be said to be "a law in regard to" that subject.

May our conclusion that there is "direct conflict" between the old revenue per-gallon system of taxation and the National Prohibition Act forbidding any advance tax stamps or receipts be said to be itself inconsistent with the Stafoff case? We think not. That case did not involve any per-gallon system of taxation and tax payment, even by distillers. It considered only R. S. Secs. 3242, 3258, 3281, and 3282. These sections forbade carrying on a distilling or rectifying business, except upon certain conditions precedent—paying special tax, giving bond and registering. The court found no "direct conflict" between these sections and the National Prohibition Act. Obviously not. There is no "direct conflict" between a provision prohibiting an act unless after condition performed and a provision prohibiting it entirely. There is substantial accord. There is only that inconsistency coming from the implied permission for one to do the act if willing

to perform the condition. There is in the comparison of these sections a good illustration of that mere inconsistency which was enough to work repeal under Sec. 35, but not enough to be the "direct conflict" of the Willis-Campbell Act.

Our conclusion is confirmed—indeed sufficiently supported by—a comparison of the rights of the parties under Sec. 26 and under Sec. 3450, as the latter is construed by the Government to reach mere transportation and as it has been interpreted in the Goldsmith-Grant case. With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections; under either he loses every right he has in the vehicle. It is otherwise with reference to the good faith mortgagee, or title holder. Sec. 3450 says his rights shall be forfeited; Sec. 26 says they shall not. Could inconsistency be more clearly "conflict," or "conflict" more surely "direct?"

The acts can not be differentiated by imputing in one case an intent to defraud the revenue, and considering this element absent in the other case. It is the Government's necessary position that the intent to defraud of the tax is inherent in the mere transportation, and so is always present.

The third question is whether there was a binding election by the Government to proceed under Sec. 26. In view of our determination upon the second question, an answer to the third becomes unnecessary.

The order of condemnation must be reversed and the case remanded for the entry of the order proper under Sec. 26.

1

As to "removal with intent, etc.," and "transportation."

U. S. v. One Ford Truck (D. C. Wash.), 286 Fed. 204.

U. S. v. One Kissel Car (D. C. Cal.), 289 Fed. 120; S. C. (C. C. A. 9), 296 Fed. 688.

U. S. v. Premier Auto (C. C. A. 9), 297 Fed. 1007.

U. S. v. Studebaker Auto (D. C. Tex.), 298 Fed. 191, 193.

U. S. v. One Cadillac Auto (D. C. Ill.), 292 Fed. 773, 775.

U. S. v. Mangano (C. C. A. 8), 299 Fed. 492.

U. S. v. One Buick Auto (D. C. Cal.), 300 Fed. 584.

U. S. v. One Buick Auto (D. C. Cal.), 1 Fed. (2nd) 997.

U. S. v. One Cadillac Auto (D. C. Tenn.), 2 Fed. (2nd) 886.

As to effect of Willis-Campbell Act upon 3450; and as to the existence of a "tax thereon" and "direct conflict."

U. S. v. One Hudson Car (D. C. Mich.), 274 Fed. 273.

One Ford Car v. U. S. (C. C. A. 8), 284 Fed. 823.

U. S. v. One Brewing Co. (D. C. Pa.), 296 Fed. 772, 774.

U. S. v. Deutsch (D. C. N. J.), not yet reported.

U. S. v. One Ford Coupe (C. C. A. 5), not yet reported.

U. S. v. One Haynes Auto (C. C. A. 5), 274 Fed. 926.

The Cherokee (D. C. Tex.), 292 Fed. 212.

U. S. v. One Bay State Roadster (D. C. Conn.), 2 Fed. (end) 666.

U. S. v. Sims (C. A. D. C.), March 2, 1925.

U. S. v. One Ford Auto, Morris Co., Intervener (D. C. Tenn.), 1 Fed. (2nd) 654.

U. S. v. One Ford Auto (D. C. Tenn.), 2 Fed. (2nd) 882.

As to election between Section 26 and R. S. 3450.

U. S. v. Torres (D. C. Md.), 291 Fed. 138.

U. S. v. One Ford Auto, Commercial Cr. Co., Intervenor (D. C. Tenn.), not yet reported.

U. S. v. 385 Bbls., etc. (D. C. N. Y.), 300 Fed. 565.

2

It might be said that since the petition charges only an intent to defraud out of the $4.20 tax, and since such tax can not attach to liquor not withdrawn for lawful purposes, there can be no condemnation under this petition.

3

Section 1300 of the Revenue Act of 1921 (40 Stats., 308), does not seem applicable. It "extends to this Act * * * stamp provisions of Law," but this Act imposes no possible relevant tax except the $4.20 tax of 600 (a) which refers only to $2.20 tax-paid liquor nor do the "stamp provisions of law" seem possible of application to that tax.

February 27, 1925.

In the United States Circuit Court of Appeals, Fifth Circuit.

The United States of America, Appellant, vs. One Ford Coupe Automobile, Motor No. 3,776,-501, Alabama License No. 10,978; Garth Motor Company, Claimant, Appellee.

Bryan, Circuit Judge:

This is a libel of information under R. S. Sec. 3450, for the forfeiture of an automobile. The facts relied on by the Government are that one Killian had the automobile in his possession and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled, with the intent to defraud the United States of its internal revenue tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title until the purchase price should be paid, of which, at the time the libel was filed, there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed, the sale was innocently made to another person. The District Court dismissed the libel.

The case is one at law, and should have been brought here for review by writ of error, instead of by appeal as was done; but that is unimportant, and we proceed to the merits. Act of Sept. 6, 1916, 39 Stat. 727.

Counsel for the Government make an elaborate and exhaustive argument to establish the proposition that the tax on intoxicating liquors, although the manufacture thereof is prohibited by the National Prohibition Act, has never been repealed, or if so, that it has been reinstated by Sec. 5 of the Act of Nov. 23, 1921, 42 Stat. 223, which provides "that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act," etc. The proposition contended for finds support in the cases of United States v. Yuginovitch, 256 U. S. 450, and United States v. Stafoff, 260 U. S. 477, and may be conceded.

It is also contended that an automobile may be forfeited according to the provisions of Sec. 3450 when used for the deposit or concealment of liquor illicitly distilled and intended for use as a beverage, with intent to defraud the United States of the tax thereon, and that Sec. 26 of the National Prohibition Act is not in conflict, because it only applies to an automobile used in the removal or transportation of liquor. Where a forfeiture occurs under Sec. 3450 the interest of an innocent owner or lien-holder is lost. United States v. Mincey, 254 Fed. 287; Logan v. United States, 260 Fed. 746; Goldsmith-

Grant Co. v. United States, 254 U. S. 505. Whereas, in cases falling under Sec. 26 of the National Prohibition Act, the rights of innocent owners or lien-holders are preserved. The position now taken by the Government in this case is that the interest of an innocent owner or lien-holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder or a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by some one who had the intent to defraud the Government of its internal revenue tax.

Section 3450 is superseded by Sec. 26 of the National Prohibition Act in so far as there is a conflict between the two. United States v. One Haynes Automobile, 274 Fed. 926. The former section applies to any goods or commodities upon which a tax is imposed, whereas the latter deals only with intoxicating liquor. An automobile actively engaged in transporting goods is at least as well adapted to facilitate violations of the revenue law as is one which is used merely for the deposit or concealment of goods. If Sec. 3450, correctly construed, makes a distinction between an automobile standing still and one in motion, we are of opinion that Sec. 26 of the National Prohibition Act operates to supersede it in so far as the forfeiture of automobiles

and other vehicles, and air and water craft, used in the handling of liquor, is concerned. The latter section deals with the subject of the unlawful possession as well as the unlawful transportation of intoxicating liquor. It prescribes such penalties on the subject with which it deals as were deemed adequate. Where the seizure is one within its terms the seizing officer has no option or election as to the forfeiture proceedings to be pursued, but is required to follow the procedure prescribed in that section. Language used in that section indicates that the applicability of the forfeiture provision therein contained was not intended to be dependent upon the seized vehicle being actually engaged in transporting intoxicating liquor when the seizure was made. That the forfeiture provision therein contained was intended to be applicable when the seized vehicle, at the time of its seizure, was used as a means of possessing intoxicating liquor, whether such liquor was or was not then being actually transported, is indicated by the fact that that forfeiture provision is immediately associated with the provision contained in the second sentence of that section: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." The just quoted language, in the connection in which it is used, is inconsistent with the existence of an intention to deal only with in-

toxicating liquors while being actually transported. It cannot well be inferred that an automobile which was seized while it was being used as a means of possessing intoxicating liquors was intended to be forfeitable otherwise than under the provision of Sec. 26 of theNational Prohibition Act if the transaction also involved the feature of concealing such liquor. A special forfeiture provision being applicable in the case of a vehicle used in possessing intoxicating liquor, in such case another forfeiture provision applicable generally to anything used, with intent to defraud the United States of a tax, for the deposit or concealment of the subject of the tax, cannot be resorted to.

The conclusion is that Congress, when it enacted the National Prohibition Act, considered the forfeiture provision of Sec. 3450, which failed to protect an innocent interest in the thing forfeited, too severe, and therefore provided a less drastic penalty which safeguards such interest.

The judgment is affirmed.